

**STATE OF NEW MEXICO  
BEFORE THE ENVIRONMENTAL IMPROVEMENT BOARD**

**IN THE MATTER OF THE PROPOSED REVISIONS  
TO THE STATE IMPLEMENTATION PLAN  
FOR REGIONAL HAZE**

No. EIB 11-01(R)



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**NOTICE OF INTENT TO PRESENT TECHNICAL TESTIMONY ON BEHALF OF  
SAN JUAN COAL COMPANY**

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Pursuant to 20.1.1.302.A NMAC, and the Order Establishing Procedures, San Juan Coal Company ("SJCC") hereby submits its Notice of Intent to Present Technical Testimony ("Notice") in the above-proceeding.

**1. The person for whom the witness will testify:**

SJCC, which is a subsidiary of New Mexico Coal, and which in turn is wholly owned by BHP Billiton.

**2. The name qualification of each technical witness:**

- Norman Dean Benally is the Head of BHP Billiton New Mexico Coal External Affairs. Mr. Benally was born and raised in the Four Corners Area. He graduated from Shiprock High School and has a Bachelor of Science degree in Business Administration from the University of Phoenix. Mr. Benally has worked with the Navajo Nation and the San Juan County local community for a large part of his professional career. His past positions with BHP Billiton include: Manager of Human Resources; Governmental Affairs, Superintendent; Assistant Superintendent of Production; Human Resources labor advisor; Senior Frontline

Supervisor, and Bargaining Unit employee for 11 years. A copy of his testimony is included as SJCC Exhibit A.

- John Ross Cline is an attorney licensed in the Commonwealth of Virginia who has been involved in Clean Air Act legal and technical issues for over thirty years. Mr. Cline was awarded a Juris Doctorate degree cum laude from the University of Richmond's T.C. Williams School of Law and also holds a Bachelor of Science degree in Chemical Engineering with high distinction from the University of Virginia. Mr. Cline primarily represents corporate clients in the mining, utility, industrial and transportation sectors of the economy and has worked on regional haze issues throughout the country including source-specific compliance plans involving best available retrofit technology ("BART") issues and other matters related to visibility protection, in general, and to "reasonable progress," in particular. Mr. Cline may be called as a rebuttal witness. A copy of Mr. Cline's testimony is attached as SJCC Exhibit B.

### **3. Summary and Estimated Duration of Testimony.**

The full text of the SJCC witnesses' pre-filed testimony is attached to this Notice as exhibits and described more fully below. It is anticipated that each witness will provide introductory remarks concerning their respective pre-filed testimony of not more than 15 minutes and will thereafter be subject to questions by interested parties. The witnesses will testify in the locations set for the hearing in this proceeding. In accordance with the Order Establishing Procedures in the proceeding, SJCC reserves the right to present rebuttal testimony and exhibits in response to testimony submitted by other interested parties.

**4. Text of Recommended Modifications to the Proposed Regulatory Change.**

SJCC supports the regulatory change as proposed by the Petitioner.

**5. List and Description of Exhibits**

The following exhibits are attached to this Notice and tendered into the record in this proceeding:

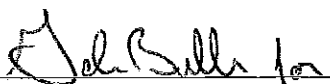
**SJCC Exhibit A** – Pre-filed Testimony of Norman Dean Benally and attached exhibits thereto.

**SJCC Exhibit B** – Pre-filed Testimony of John Ross Cline.

**6. Reservation of Rights**

SJCC reserves the right to call any person to testify, and to present any exhibit, in response to another notice of intent or public comment filed or submitted in this matter. SJCC further reserves the right to refer to any testimony or exhibit offered in this proceeding by another other person.

BHP Billiton

By: 

Charles E. Roybal, Esq.  
Manager of Energy Coal Legal  
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Farmington, New Mexico 87401  
Tel: (505) 598 - 4358 - direct  
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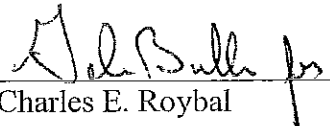
**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing Notice was mailed to the following persons on May 17, 2011:

Bill Grantham  
NM Environment Department  
P.O. Box 5469  
Santa Fe, New Mexico 87502-5469

Louis Rose  
Montgomery & Andrews PA  
P.O. Box 2307  
Santa Fe, New Mexico 87504-2307

Stephen A. Vigil  
Office of Attorney General  
Civil Division  
P.O. Box 1508  
Santa Fe, New Mexico 87504-1508

  
\_\_\_\_\_  
Charles E. Roybal

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**SJCC EXHIBIT A  
DIRECT TESTIMONY OF NORMAN DEAN BENALLY**

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**I. INTRODUCTION AND QUALIFICATIONS**

My name is Norman Dean Benally. I currently serve as the Head of BHP Billiton New Mexico Coal External Affairs. My responsibilities include governmental affairs and community and media relations. Born and raised in the Four Corners Area, I graduated from Shiprock High School and have a Bachelors' of Science degree in Business Administration from the University of Phoenix. I began my career at the Navajo Mine with BHP Billiton in 1972 as a janitor. Past positions that I have held at BHP Billiton include: Manager of Human Resources, Governmental Affairs Superintendent, Assistant Superintendent of Production, Human Resources labor advisor, Senior Frontline Supervisor, and Bargaining Unit employee for 11 years.

I am offering this testimony on behalf of the San Juan Coal Company ("SJCC" or "Company"), a subsidiary of New Mexico Coal which in turn is wholly owned by BHP Billiton. The Company operates the San Juan Mine, an underground coal mine on federal and state lands in northwestern New Mexico along with the Navajo Mine, a surface coal mine located on the Navajo Nation. The San Juan Mine sells coal to the San Juan Generating Station, which is operated by Public Service of New Mexico ("PNM"). As a result, the Company is a significant stakeholder in the future and sustainability of the San Juan Generating Station.

## **II. PURPOSE AND SCOPE OF TESTIMONY**

As a company, we support the New Mexico Environment Department (“NMED”) proposal for SJGS to establish best available retrofit technology (“BART”) to regulate nitrogen oxides (“NOx”) and particulate matter (“PM”). We are concerned over a recent U.S. Environmental Protection Agency (“EPA”) proposal that would establish BART for SJGS and we believe that the State of New Mexico is in the best position to establish BART for SJGS. My testimony pertains to the socioeconomic benefits and impacts of our operations on the State of New Mexico, San Juan County, and the Navajo Nation.

## **III. IMPACT ON FOUR CORNERS REGION**

In 2010, New Mexico Coal employed 1,038 people in Northwestern New Mexico at our San Juan and Navajo Mines with a total payroll of approximately \$93 million. Our workforce is 63 percent Native American and we account for nearly 3 percent of employment in San Juan County. We are a significant contributor to the local and state economy. Our bargaining unit miners are represented by Local 953 of the International Union of Operating Engineers. We currently are the largest private employer in San Juan County and the Navajo Nation where unemployment currently exceeds 50 percent. In 2010, our New Mexico Coal operations paid state, local, tribal, and federal taxes and royalties of over \$116 million or \$8.62 per ton, plus state and federal income taxes. In addition, we spent over \$150 million in 2010 on equipment, services, and supplies for the two mines.

The San Juan Mine currently employs approximately 529 employees with a total payroll of approximately \$46 million. In 2010, the San Juan Mine paid state, local, tribal, and federal taxes and royalties of approximately \$49 million or \$9.58 a ton, plus state and federal income taxes. This includes approximately \$24 million in New Mexico taxes and nearly \$11 million in royalties to New Mexico.

As a company, we are committed to sustainable development and we strive to be a business that is actively creating a positive legacy in our community. We are a major contributor to both the San Juan United Way and the Navajo United Way. We were the first \$1 million dollar donor in the San Juan United Way's 50-year history in fiscal year 2010. This was repeated in 2011. In July of 2009, BHP Billiton established a Community Investment Fund, which resulted in \$383,000 being awarded under this fund to thirty-four deserving non-profit organizations in 2010.

I am attaching to my testimony two fact sheets which further describe the socioeconomic beneficial impacts of the San Juan Mine on San Juan County, the Navajo Nation, and the Four Corners Region.



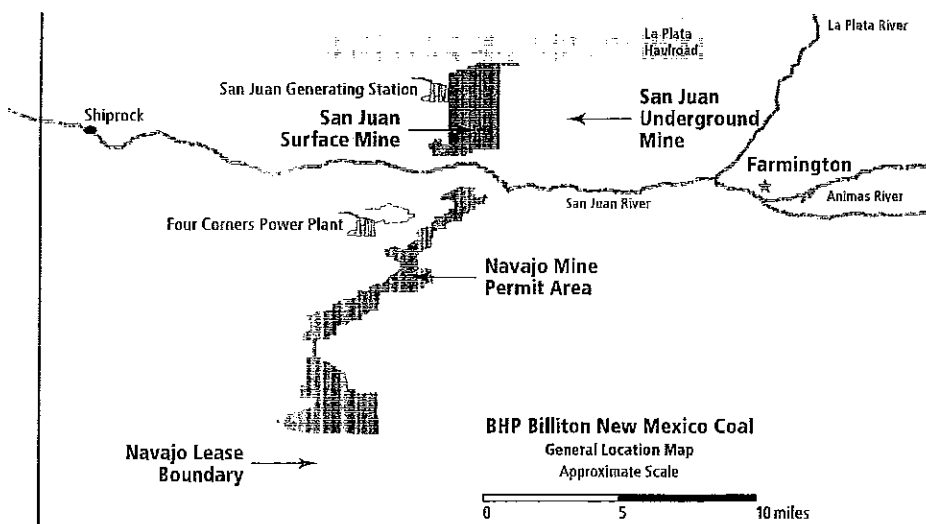
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## New Mexico Coal

# Fact Sheet

## San Juan Mine

The San Juan Coal Company operates the San Juan Mine, located west of Farmington in the Four Corners region.



BHP Billiton Location Map

### Overview

BHP Billiton's New Mexico Coal is comprised of the BHP Navajo Coal Company and the San Juan Coal Company (SJCC). SJCC operates the San Juan Underground Mine, which is a single "longwall" operation. SJCC also operates the San Juan surface operation, which is now in full reclamation. Both are located in New Mexico's Four Corners region.

The San Juan Underground Mine is the sole supplier of fuel to the 1,800 Megawatt San Juan Generating Station.

### History

San Juan Mine's surface operations began in 1973. Surface mining came to an end in 2002 when the San Juan Underground Mine started its production. Today, full scale reclamation continues at the surface mine.

The San Juan Underground Mine, which supplies coal to the nearby San Juan Generating Station operated by the Public Service Company of New Mexico, mined approximately five million tons of coal in 2010. Underground operations continue to play a significant role in meeting the energy needs of New Mexico and the Southwest.

### Surface Reclamation

BHP Billiton aims to restore post-mine land with innovative, award-winning reclamation technology. The reclamation approach at San Juan surface operations uses techniques and channel designs based on fluvial geomorphic principles and continues to be recognized as leading technology by industry, scientific, environmental and regulatory groups. The post-mine land use is designated as livestock grazing.

The San Juan Mine received the 2007 Excellence in Reclamation Awards at the New Mexico Mining Association Annual Convention.





Reclamation at San Juan Mine

### Safety and Environmental Performance Highlights

Ongoing regulatory inspections occur at all BHP Billiton New Mexico Coal operations. The San Juan Mine surface operations are inspected by the New Mexico Mining and Minerals Division (MMD) and New Mexico Environment Department.

The MMD also issues the San Juan Mines its operating permit, called the Surface Mining Control and Reclamation Act permit, which was renewed in Fall 2009.

The Mine Safety and Health Administration (MSHA) also regularly inspects San Juan Mine. New underground regulations, a changed regulatory climate, increased public scrutiny, focused regulatory inspections and other related factors stemming from mining accidents in the United States in recent years has triggered heightened inspections of mining operations. BHP Billiton welcomes the assessments. San Juan Mine is confident in its proactive approach to safety and its ability to quickly address potential citable areas.

In June 2007, BHP Billiton revised its Climate Change Policy. To comply with this new outlook, San Juan Underground Mine anticipates it will reduce energy consumption from purchased electricity by five percent, distillate 40 percent, and natural gas five percent by 2012. San Juan Underground Mine also anticipates it will reduce greenhouse gas emissions due to methane release from underground boreholes by 50 percent by 2012. This will account for a 27 percent overall energy reduction and a 15 percent reduction of greenhouse gas emissions.

In addition, the San Juan Mine will continue to work to decrease its overall water usage.

For further information, please contact:

BHP Billiton  
300 West Arrington, Suite 200  
Farmington, New Mexico 87401

Telephone: 505-598-4200  
Fax: 505-598-4300  
bhpbilliton.com

### 2010 Economic Impact Highlights

- \$24,235,584 in New Mexico State taxes
- \$3,449,173 in tribal taxes
- \$7,001,997 in federal taxes
- \$14,080,798 in royalties
  - \$10,974,757 state royalties paid
  - \$3,106,041 federal royalties paid
- \$45,247,203 total payroll shared by 529 employees
  - 191 salaried employees
  - 338 hourly employees

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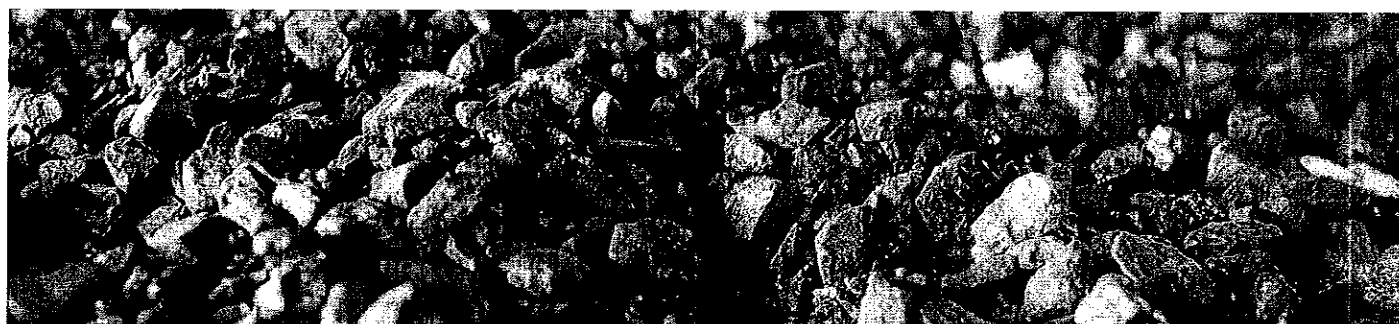
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## New Mexico Coal

# New Mexico Coal Operations Calendar Year 2010



### Overview

In calendar year 2010, BHP Billiton's two coal mines, San Juan Underground Mine and Navajo Mine, mined 12,781,684 tons of sub-bituminous coal. Coal from these mines supplied the San Juan Generating Station and Four Corners Power Plant.

BHP Billiton New Mexico Coal operations employed 1,038 people with a total payroll of \$93,065,059. The work force is 63 percent Native American and BHP Billiton employees total almost 3 percent of San Juan County's employment. In 2010, over \$150 million was spent on equipment, services, materials, and supplies for the two mines.

### State and local taxes and royalties paid in 2010 include:

• Property Tax	\$4,431,726
• Severance Tax	\$8,450,841
• Conservation Tax	\$774,250
• Resource Excise Tax	\$3,059,198
• Gross Receipts Tax	\$25,375,837
• Royalty - State and 50 percent of Federal Royalty	\$10,974,757

In 2010, BHP Billiton's New Mexico Coal operations paid state, local, tribal and federal taxes and royalties totaling \$116,290,898 or \$8.62 per ton, plus State and Federal Income taxes.

### For further information, please contact:

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300 West Arrington, Suite 200  
Farmington, New Mexico 87401

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Fax: 505-598-4300  
[bhpbilliton.com](http://bhpbilliton.com)

## BHP Billiton New Mexico Coal - Calendar Year 2010

	NAVAJO COAL	SAN JUAN COAL	TOTAL
<b>QUANTITIES</b>			
TONS SOLD <sup>1</sup>	7,890,514	5,594,792	13,485,306
TONS MINED	7,809,929	4,971,755	12,781,684
<b>NMC EMPLOYEES AS OF 12/31/10</b>			
TOTAL SALARIED	155	191	346
TOTAL HOURLY	354	338	692
TOTAL HEADCOUNT <sup>2</sup>	509	529	1,038
<b>PAYROLL</b>			
TOTAL PAYROLL <sup>2</sup>	\$ 46,817,856	\$ 46,247,203	\$ 93,065,059
<b>ROYALTIES</b>			
TRIBAL	\$ 26,802,424	\$ —	\$ 26,802,424
STATE (INCL 1/2 FEDERAL)	—	10,974,757	10,974,757
FEDERAL (FEDERAL PORTION ONLY)	—	3,106,041	3,106,041
TOTAL ROYALTIES	\$ 26,802,424	\$ 14,080,798	\$ 40,883,221
<b>NEW MEXICO STATE TAX</b>			
PROPERTY	\$ 2,328,629	\$ 2,103,097	\$ 4,431,726
SEVERANCE	5,332,543	3,118,298	8,450,841
CONSERVATION	333,974	440,276	774,250
RESOURCE EXCISE	1,321,265	1,737,932	3,059,198
GROSS RECEIPTS	8,539,857	16,835,980	25,375,837
TOTAL STATE TAXES	\$ 17,856,268	\$ 24,235,584	\$ 42,091,852
<b>FEDERAL TAXES</b>			
BLACK LUNG TAX	\$ 4,327,713	\$ 6,236,596	\$ 10,564,309
RECLAMATION ACT LEVY	2,478,162	765,400	3,243,563
TOTAL FEDERAL TAXES	\$ 6,805,875	\$ 7,001,997	\$ 13,807,872
<b>TRIBAL &amp; OTHER TAXES</b>			
NAVAJO BUSINESS ACTIVITY	\$ 3,940,000	\$ —	\$ 3,940,000
NAVAJO POSSESSORY INTEREST	3,779,253	—	3,779,253
PAYROLL TAXES <sup>2,3</sup>	3,503,444	3,449,173	6,952,616
TOTAL TRIBAL & OTHER TAXES	\$11,222,697	\$3,449,173	\$14,671,870
TOTAL TAXES <sup>4</sup>	\$ 35,884,840	\$ 34,686,753	\$ 70,571,593
TOTAL TAXES & ROYALTIES	\$ 62,687,264	\$ 48,767,551	\$ 111,454,814
TOTAL TAX & ROY PER TON SOLD <sup>1</sup>	\$7.94	\$ 9.58	\$8.62

<sup>1</sup> TONS SOLD REFLECTS STOCKPILE AND FUTURE SALES MADE IN 2010<sup>2</sup> NAVAJO MINE'S HEADCOUNT AND PAYROLL FIGURES INCLUDES CENTRAL SERVICE PAYROLL<sup>3</sup> PAYROLL TAXES ARE PRO-RATED TO MINES BASED UPON GROSS PAYROLL AMOUNTS<sup>4</sup> TOTALS AND TOTAL PER TON EXCLUDE TAX ON PROFIT

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**SJCC EXHIBIT B  
DIRECT TESTIMONY OF JOHN R. CLINE**

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**I. INTRODUCTION AND QUALIFICATIONS**

My name is John Ross Cline. Licensed to practice law by the Commonwealth of Virginia, I am a solo practitioner doing business as John R. Cline, PLLC with an office at 8261 Ellerson Green Close, Mechanicsville, Virginia 23116. My practice focuses on environmental and energy law, with a particular emphasis on Clean Air Act (“CAA” or “Act”) matters. I primarily represent corporate clients in the mining, utility, industrial and transportation sectors of the economy. I was awarded a juris doctor degree cum laude from the University of Richmond’s T.C. Williams School of Law. I also hold a bachelor of science degree in chemical engineering with high distinction from the University of Virginia.

I have been involved with Clean Air Act issues in either a legal or a technical capacity for over thirty years. With respect to regional haze issues, from 2004 to 2009 I represented a coalition of industrials and electric utilities with operating facilities throughout the southeastern United States. In that capacity, I not only monitored and commented on EPA’s development of regulations and guidance regarding regional haze, but I also participated in various stakeholder activities sponsored by the regional planning organization for the southeastern U.S. known as “VISTAS” (Visibility Improvement State and Tribal Association of the Southeast). On behalf of

that business coalition, I also prepared comments on draft regional haze state implementation plans (“SIPs”) of several states. In addition, I have counseled individual clients on source-specific compliance plans involving best available retrofit technology (“BART”) issues and other matters related to visibility protection, in general, and to “reasonable progress,” in particular.

I have personally prepared this testimony on behalf of the San Juan Coal Company (“SJCC” or “Company”), a subsidiary of New Mexico Coal which in turn is wholly owned by BHP Billiton.

## **II. PURPOSE AND SCOPE OF TESTIMONY**

Because New Mexico has not submitted a regional haze SIP, EPA has now proposed a federal implementation plan (“FIP”) that would require BART for NO<sub>x</sub> emissions from the San Juan Generating Station (“SJGS” or “Station”). 76 Fed. Reg. 491 (Jan. 5, 2011). Nevertheless, as evidenced by this proceeding before the EIB, NMED has proposed to finalize a regional haze SIP for New Mexico in accordance with the requirements of 40 C.F.R. § 51.309. NMED, *Revision to the New Mexico State Implementation Plan for Regional Haze* (proposed), Dec. 20, 2010 rev. (hereinafter “309 SIP”). The State’s proposed “309 SIP” is accompanied by a supplemental proposal prepared in keeping with the requirements of 40 C.F.R. § 51.309(g). NMED, *New Mexico State Implementation Plan, Regional Haze, Section 309(g)* (proposed), Mar. 31, 2011 rev. (hereinafter “309(g) SIP”). Included as Appendix D within that proposed 309(g) SIP is NMED’s proposed BART determinations for NO<sub>x</sub> and PM emissions from San Juan Generating Station. NMED, *BART Determination, Public Service Company of New Mexico, San Juan Generating Station Units 1-4* (proposed), Feb. 28, 2011 (hereinafter “NMED BART Determination”).



San Juan Coal Company operates the San Juan Mine, an underground coal mine on federal land in northwestern New Mexico. The Mine employs approximately 500 people and sells coal to the San Juan Generating Station. As such, the Company is a significant stakeholder in the sustainability of the Station.

The Company has an especially strong interest in NMED's proposed BART determinations for the four generating units at San Juan Generating Station. The Company is concerned with that proposal's implications for the future operations of those generating units. In addition, the Company is troubled by EPA's recently proposed BART determination for the Station that, if finalized, would become federally enforceable under the CAA instead of any BART determination made by the State.

The purpose of this testimony on behalf of San Juan Coal Company is to strongly support NMED's action to determine BART for SJGS, even though EPA has already proposed to make that BART determination. As demonstrated herein, EPA was well aware that, when Congress enacted the BART provision in 1977 as part of the visibility protection program under the Act, Congress delegated broad discretion to each state to account for local conditions and circumstances when the state determined BART on a source-specific basis by balancing its considerations of particular factors designated in the statute. EPA understood the inappropriateness of the Agency making those individual BART decisions because the state had the most complete knowledge of local factors that would affect those decisions. Because New Mexico is now on the cusp of finalizing that BART determination, the Company hopes that EPA will withdraw its proposed BART determination for SJGS in acknowledgment of the strong congressional preference for the State to make that decision.

Moreover, the Company questions EPA's intent to promulgate only a single portion of a regional haze plan for New Mexico. The promulgation of a single BART requirement in the complete absence of any reasonable progress analyses is neither logical nor lawful. For that reason as well, the Company strongly endorses the State's development of a complete regional haze plan as opposed to EPA's decision "to take aim" at one source within the entire State.

### **III. NEW MEXICO, NOT EPA, SHOULD DETERMINE BART FOR SAN JUAN GENERATING STATION.**

#### **A. Congress Emphasized the Need for States to Determine BART.**

The BART requirement is part of the visibility protection program which Congress enacted with the Clean Air Act Amendments of 1977. CAA § 169A(b)(2)(A). EPA subsequently implemented its first BART regulatory requirements in 1980 to address visibility impairment that could be traced to a single existing stationary facility or small group of existing stationary facilities. 45 Fed. Reg. 80,004 (Dec. 2, 1980) (codified at 40 C.F.R. §§ 51.300-51.307). Although that regulation addressed BART for "reasonably attributable visibility impairment" or "RAVI," the statutory concept of how BART should be determined applies equally to current determinations of BART for regional haze.

During the legislative process when Congress considers particular provisions of bills and amendments, the federal agency that will ultimately implement the final statute is typically heavily involved in providing Congress with essential materials to inform that process. For that reason, courts typically give more weight to an agency's statutory interpretation that was made contemporaneously with the statute's passage. William N. Eskridge, Jr. and Philip P. Frickey, Legislation, "Statutes and the Creation of Public Policy," 860 (1995) (internal citations omitted). . Consequently, the history of EPA's earliest regulation for BART provides critical insight into how Congress expected BART to be determined. As demonstrated below, EPA's statements

shortly after enactment of CAA § 169A confirm that Congress intended for each state to have substantial flexibility to determine BART in keeping with a source-specific analysis that allowed the state to account for local factors and site-specific considerations.

BART, of course, is just one measure for making reasonable progress. The respective roles which Congress envisioned for EPA and the states in the BART decision-making process is succinctly explained in the following EPA statement:

[T]he visibility regulations give the States a great deal of flexibility in determining the measures they choose to assure reasonable progress toward the national visibility goal. As the Act requires, EPA has provided measures for the States to consider, but left the actual “mix” of measures adopted to the States’ discretion.

EPA, “Summary of Comments and Responses on the May 22, 1980 Proposed Regulations for Visibility Protection for Federal Class I Areas,” EPA-450/2-80-083a, 172 (Oct. 1980) (hereinafter “1980 Responses to Comments”).

In other words,

“[t]he State, however, retains final authority for the development of the SIP, BART determinations, and implementation of the visibility program. EPA would remain primarily in a technical and policy advisory position, continuing research on visibility and developing Phase II regulations when it becomes technically feasible.”

45 Fed. Reg. 34,775 (May 22, 1980).

When it enacted the visibility protection program in 1977, Congress specifically required that determination of BART for a particular source must take into consideration

the costs of compliance, the energy and nonair quality environmental impacts of compliance, any existing pollution control technology in use at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.

CAA § 169A(g)(2). Consequently, a BART determination is frequently referred to as a “five-factor analysis” in recognition of the five particular, source-specific “factors” that Congress expected to inform each individualized BART determination.

During the early days of EPA’s implementation of a visibility protection program, the Agency acknowledged the importance of each state having the discretion to weigh its considerations of those statutory factors on a case-by-case basis in a manner that addressed that state’s particular policies and preferences. As EPA noted:

It is, of course, not possible to provide more specific guidance on how a State should balance the various BART factors while simultaneously giving the State more flexibility to strike the balance it deems appropriate in light of local and site-specific considerations. A strictly quantitative approach, however, is not necessarily a better alternative. The procedures outlined in Part I [of the 1980 BART Guidelines] allow States to consider local conditions and circumstances in their BART decisionmaking. This recognizes that States have the most complete knowledge of local factors that would affect the BART decision, and retains State discretion to consider the factors in a case-by-case manner as was intended by § 169A. The inappropriateness of EPA making these decisions for the States . . .

EPA, 1980 Responses to Comments at 189.

Indeed, EPA’s first BART Guidelines in 1980 advised the states to structure their SIP submittals to show clearly how they had balanced the statutory factors for each source-specific BART determination. As EPA explained shortly after Congress enacted the BART requirement:

In determining BART, and for inclusion in its SIP, the State must explain in detail how it weighed the various BART factors required by the Act (§ 169A(g)(2)), the regulations (§ 51.301(c)), and this guideline. This explanation must demonstrate that the emission limitation chosen . . . reflects a reasonable balance of the various BART factors.”

\* \* \* \*

The State must also present the logic network used in its final [BART] decision making process.

EPA, “Guidelines for Determining Best Available Retrofit Technology for Coal-fired Power Plants and Other Existing Stationary Facilities,” EPA-450/3-80-009b, 20-21 (Nov. 1980).

Based on the legislative history of CAA § 169A, EPA was well aware during its earliest implementation of the visibility protection program that Congress had no intention of BART being defined as a national visibility standard or a “one-size-fits-all” control technology.

Whether all of these measures . . . are necessary to a long-term strategy for making reasonable progress. . . depends on the particular circumstances of the area. Many commenters to the ANPR favored this flexible, area-specific approach. . . . EPA believes that regional differences in meteorological conditions around the country and varying degrees of visibility impairment and land management practices in and around the class I areas should be reflected in the visibility program. . . . EPA’s proposal [for the elements of a long-term strategy] is consistent with the Act and its legislative history which also required the BART analysis to consider local factors and recognized that a national visibility standard would be ‘impracticable.’”

45 Fed. Reg. 34,764.

In sum, the history of EPA’s original development of BART regulations demonstrates that EPA understood the necessity for a state to determine BART for each affected source because EPA could not possibly be expected to appropriately balance its considerations of the statutory factors in a manner that would reflect that state’s particular circumstances and underlying concerns. That fundamental principle embedded in the statutory provisions of 169A has not changed over time.

**B. EPA’s Method for Determining BART for San Juan Generating Station Falls Far Short of What Congress Intended.**

A key section of EPA’s BART Guidelines consists of guidance on how to apply consideration of each of the five statutory factors when determining BART. Appendix Y, § IV of 40 C.F.R. Part 51. On its face, that process for considering each statutory factor seems to be

reasonable and to allow flexibility. However, EPA's actual application of those Guidelines in this case tells a different story.

EPA's BART determination for NO<sub>x</sub> emissions from the generating units at SJGS has not resulted from a balancing of the five statutory factors in any meaningful way that reflects New Mexico's particular circumstances and concerns. EPA's determination has not been substantively informed by any source-specific or site-specific matters. Indeed, EPA's BART determination did not even consider potential visibility improvements from different control options in all of the class I areas in the State. Instead, EPA's BART determination for SJGS consists of a narrow analytical methodology that seems designed to produce a predetermined result.

In determining BART for SJGS, EPA's consideration of the statutory factors involves a mechanical, step-wise assessment of a "faceless" source, paying little more than lip service to most of those factors. In the end, EPA's "five-factor analysis" for SJGS comes down to the Agency's assessment of the "cost-effectiveness" of different BART candidates. The Agency has not even considered the "costs of compliance" as the statute envisioned. Instead, EPA has evaluated costs of control measures in terms of annualized cost per ton of pollutant removed annually, i.e., the familiar "\$/ton" value. EPA has offered no explanation for how it can use that particular metric to evaluate a control measure's relative cost-effectiveness in terms of visibility improvement.

EPA's determination of BART for SJGS falls far short of the individualized assessment that Congress contemplated. There has not been any meaningful balancing of considerations peculiar to New Mexico's policies and preferences. There is little in that determination that is distinctively characteristic of the local area or of SJGS's circumstances. EPA's BART

determination for SJGS is a product of the Agency's "one-size-fits-all" approach that invariably selects the maximum emission reductions that are technologically achievable.

**C. NMED's Method for Determining BART for San Juan Generating Station Exercises the Discretion Delegated by Congress.**

NMED's methodology for determining BART for SJGS is a measured application of EPA's BART Guidelines which reflects an appropriate weighing of the statutory factors to accommodate local conditions and circumstances as Congress intended.

As noted above, EPA's BART determination has been performed "in a vacuum." A BART decision only for a single stationary source has no context because it is not part of a larger plan to achieve reasonable progress. By contrast, NMED's BART determination for SJGS is just one of several decisions that have been integrated into an overall regional haze plan for reducing visibility impairment in class I areas significantly affected by the State's emissions.

Some observers will undoubtedly conclude that NMED's proposed BART determination for NO<sub>x</sub> emissions from SJGS is unacceptable because it is less stringent than EPA's proposed BART for those NO<sub>x</sub> emissions. But that difference in BART determinations illustrates the precise point that Congress had intended when it developed the concept of BART. Contrary to EPA's "one-size-fits-all" approach to determining BART, NMED's considerations of the statutory factors have been weighed according to source-specific matters, including in particular the relative levels of adverse economic impacts on residents of New Mexico due to different BART candidates for San Juan Generating Station.

For this proceeding, NMED has relied on the flexibility intended by the statute to ensure that its BART determinations for San Juan Generating Station have been appropriately informed by source-specific issues and state/local-specific concerns. NMED should be applauded for applying the statutory factors to the circumstances of SJGS in order to achieve reasonable

progress in a manner that the Department found was in the best interests of the State of New Mexico.

#### **IV. CONCLUSION AND RECOMMENDATION**

EPA undoubtedly has authority under the Clean Air Act at this time to promulgate a regional haze FIP for New Mexico. Such a plan, however, is expected to consist of a number of different control actions that collectively will make sufficient reasonable progress during this initial planning period ending in 2018. Thus, if EPA decides to exercise its authority to adopt a regional haze FIP for New Mexico, then EPA needs to fully develop that plan for the State rather than simply “cherry-pick” only one component of the plan that it wants to address.

In this case, EPA’s focus is not on a regional haze plan. Instead, its FIP authority has been targeted on a single stationary source, applying the Agency’s inflexible, “cookie-cutter” BART philosophy heavily weighted towards selecting SCR as BART for any BART-eligible coal-fired generating unit.

On the other hand, the State of New Mexico is working not only to determine BART for that same source, but also to provide for other control measures and related actions that comprise an entire plan to “make reasonable progress,” as the Clean Air Act mandates. Importantly, NMED’s approach to determining BART has no predetermined result but instead has weighed its considerations of the statutory factors on a case-by-case basis that reflects the State’s particular policies and preferences for complying with the regional haze program of the Clean Air Act.

Congress had a clear vision of how each state should determine BART for the affected sources in that state. To that end, NMED’s BART determination for San Juan Generating Station is consistent with that congressional intent, but EPA’s BART determination for the same source is not. Accordingly, San Juan Coal Company strongly urges the Environmental



Improvement Board to approve NMED's proposed BART determination for San Juan Generating Station.

Moreover, the Company hopes that the Board will approve NMED's complete scope of regional haze plan revisions as quickly as practicable. Prompt Board action will then enable NMED to submit the State's regional haze plan to EPA, requesting EPA to accept the State's BART determination for San Juan Generating Station in keeping with how Congress expected BART to be determined.